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October 15, 2001

John Wallace
Fair Political Practices Commission
428 "J" Street, Suite 620
Sacramento, CA 95814

**RE: CONFLICT OF INTEREST REGULATIONS
SECTION 18707.4**

Dear John:

On behalf of our client, L.A. Care Health Plan, I am providing you with this letter explaining our interests in proposed changes to Section 18707.4 of the conflict of interest regulations. We appreciate your ongoing communications with us regarding the Commission's progress on the conflict-of-interest regulations and look forward to continuing to work with you on this issue.

As you know, L.A. Care is very concerned with the outcome of this regulatory process because of the difficulties our Board of Governors faces in carrying out its duties. Most of the decisions the L.A. Care Board makes are likely to directly affect the financial interests of at least some of our stakeholder board members. As a result, L.A. Care's most important decisions are made without the participation of often a majority of board members—and they are most often those who have the greatest knowledge about the matters decided.

To provide you with some background, L.A. Care Health Plan is a public, not-for-profit health plan that has served Los Angeles County since 1997. More than 700,000 children and their parents receive health care through L.A. Care's Medi-Cal managed care program, its Healthy Families program and the CaliforniaKids plan.

L.A. CARE IS A UNIQUELY STRUCTURED ORGANIZATION

Unlike private health plans in the state, L.A. Care was created by legislation and is a quasi-government entity in the County of Los Angeles. In authorizing the creation of L.A. Care, the Legislature directed that the plan's 13-member Board of Governors include representatives of the consumers, community clinics, federally qualified health centers, hospitals, physicians, health plans and local governments that participate in L.A. Care.

Each member of the Board is designated in statute as a representative of a specific group or of a class of entities or individuals. Each member is nominated by either a specified organization or,

when a only class of entities or individuals is specified, by an entity or group recognized by the County Board of Supervisors as the nominating entity. By their very nature, these organizations or groups have memberships that are much broader than L.A. Care's network of providers, plans and other entities.

Another unique aspect of L.A. Care is that it delivers services to its Medi-Cal members through a network of health plans, known as "Plan Partners. The five health plans that currently comprise our plan partners are Blue Cross of California, Care 1st Health Plan, Community Health Plan, Kaiser Permanente and UHP Healthcare. These health plans, in turn, contract with hospitals, clinics and physicians in the community. As a result, when the L.A. Care Board makes a decision affecting its contracts with its Plan Partners, the impact of the decision may have an indirect financial effect on all of the subcontracting providers to each health plan. This increases the number of board members who are "financially interested" in a decision, even though the decision affects all stakeholders in a category in the same manner.

With respect to the Healthy Families program, L.A. Care offers its own delivery system through direct contracts with providers. Board members who are providers may have a conflict of interest with regard to decisions regarding these contracts, even though those decisions are likely to impact all contracting providers in the same way.

CONFLICT-OF-INTEREST LAWS HINDER FULL PARTICIPATION

L.A. Care is subject to Government Code Section 1090 and to the Political Reform Act. In order to allow L.A. Care's stakeholder board to operate within this framework, the Legislature enacted Section 14087.969 of the Welfare and Institutions Code when it created L.A. Care. That code section declares that no member of L.A. Care's Board of Governors or any of its advisory panels shall be deemed to be interested in a contract entered into by the Board when certain conditions are met. This statute permits L.A. Care to enter into contracts with the various health care facilities and providers in the county even though individuals with interests in those entities may sit on the Board.

As a result of that legislation and its specific provisions, L.A. Care's contracts contain substantially the same terms and conditions for all providers of the same type. The development of standard health plan policies that guide or ultimately result in these standard contract provisions, however, has been hindered by the fact that several board members are often deemed to have a financial interest in the matter and are prohibited from discussing or voting on those standard policies. In fact, almost all major decisions related to policy, programs as well as contracts can result in more than a majority of the Board being forced to abstain. Some key examples are provided below:

- **The Annual Strategic Plan:** Only four of the 13 Board members were allowed to discuss and vote on one of L.A. Care's strategic plan initiatives to increase access and quality care. The other members present were forced to abstain because of one initiative to increase the financial stability of the safety net. Health care providers, naturally, were deemed to be financially interested in that provision.
- **Annual Quality Improvement Program:** Despite the clinical and administrative expertise of several Board members, only three Board members were able to discuss and vote on a program to increase health care quality that included incentives and sanctions. These incentive measures created conflicts for the plan and provider representatives because they could be financially helped or harmed by the provisions.

- **Performance Incentives Program.** Only four of the 13 Board members were able to vote on a \$2 million allocation to reward providers meeting certain quality standards in the provision of medical care—a vital element of L.A. Care's quality management efforts. Conflicted Board members were deemed to have a financial interest in L.A. Care's Plan Partners and participating providers.

These are critical operational and policy issues that appointed members of such a board should be involved in. The conflict of interest rules have severely hindered the members of L.A. Care's board in their responsibility to oversee the health plan. These examples reflect just a few of such major policy decisions. In other cases, when absentees are considered, sometimes as few as two board members have made board decisions.

L.A. Care's enabling legislation, which specifies the types of stakeholders who constitute the Board, embodied the Legislature's intent to create a board of experts and community interests who would oversee the policy and operations of the health plan. This intent cannot be fulfilled without the ability of Board members to contribute their personal expertise and the perspective of their respective nominating entities. Thus, the conflict of interest laws thwart the Legislature's intent in creating L.A. Care.

PUBLIC GENERALLY EXCEPTION IS APPROPRIATE AVENUE TO SOLUTION

Section 87103 of the Political Reform Act defines when a member of a governing body has a "financial interest" in a decision and distinguishes that circumstance from when a decision has an "effect on the public generally." Section 18707.4 of the California Code of Regulations defines when that "public generally" exception applies. Section 18707.4 was designed to apply to members of board and commissions who are appointed to represent a specific economic interest, as the LA Care Board of Governors is.

Section 18707.4 was created to provide an exception when boards or commissions comprised of individuals appointed to represent certain interests make decisions that would affect the broad group of individuals within the jurisdiction of that board or commission. This exception would, for example, allow a pharmacist appointed to the California Board of Pharmacy to vote on a policy or issue that affected all California pharmacists—but would not, for example, permit that pharmacist vote on a disciplinary matter affecting the pharmacy that he or she worked for.

L.A. Care believes that the intent of Section 18707.4 is to permit boards like L.A. Care's to function appropriately and permit the needed discussion and participation by stakeholder board members when matters affecting the constituency generally come before the Board. But Section 18707.4, as currently drafted, is difficult to apply to L.A. Care's board members because of the way L.A. Care's authorizing statute was drafted and the fact that L.A. Care's jurisdiction is not determined by geographic boundaries, but rather by contractual relationships. As a result of this difficulty, L.A. Care has suggested several amendments to Section 18707.4 that we believe maintain the integrity and purpose of the regulation while allowing L.A. Care's board members to use this regulation in the appropriate instances. Those changes are explained below and provided in mock-up form in an attachment to this letter.

1. Minor Technical Changes Are Needed

Paragraph (a) (1) of Section 18707.4 requires that the statute authorizing the board contain a "finding and declaration" that the persons appointed to the board are appointed to represent the specific economic interest. L.A. Care's authorizing statute contains no "finding and declaration" to that effect. The code section that sets forth the constitution of L.A. Care's Board specifically states that the board members are to represent specific economic interests, but this is not contained in "findings and declarations," which are typically designated as such (and are often in

uncodified intent language). Thus, we encourage the Commission to insert "or other statutory provision" into the language of this section. We believe that is a nonsubstantive, technical change.

In addition, paragraph (a) (1) of Section 18707.4 requires that the statute creating the board or commission contain a finding and declaration that the board member be appointed to "further the interests of" the specific economic interest. L.A. Care's authorizing statute contains no such express finding and declaration. We believe that this purpose is implicit in our authorizing statute, but absent formal clarification we believe that striking the phrase would not impair the purpose of the "public generally" exception.

2. Requirement of Financial Interest Would Preclude Qualified Board Members

Paragraph (a) (2) of Section 18707.4 requires that the member of the board or commission be specifically required to have the economic interest that the member represents. L.A. Care's authorizing statute contains no such requirement. And, in fact, such a requirement may be difficult to satisfy for our consumer advocate member, for example. A consumer advocate is usually highly educated about health care obstacles faced by consumers, though that advocate may not be an enrollee of the health plan. Requiring a financial interest of our consumer member may also be difficult because our enrollees are beneficiaries of public health programs and do not pay premiums. Thus, they do not have a clear financial interest.

In addition, we have on our Board currently a retired physician who is exceptionally qualified and seriously committed to his role on the Board. The California Association of Health Plans nominated an individual that previously worked for a health plan but no longer had that interest. We believe that qualified individuals would be precluded if our statute were amended to require that all board members hold the financial interest that they were appointed to represent. It is currently very difficult for the nominating entities designated in statute to name board members to find qualified individuals who are willing to serve. Amending the statute to include such a requirement would make this task even more difficult.

An authorizing statute does not need to contain a requirement of a financial interest in order for an exception for decisions affecting the public generally to be appropriately applied in an circumscribed manner. Only board members who have an economic interest would ever need to apply the public generally exception to their circumstance. Thus, we have suggested that this paragraph either be stricken or amended to say, "The member ~~is required to have~~ *has* the economic interest the member represents."

3. Definition of "Public Generally" is Major Issue

The more important issue in this regulation is how the "public generally" is defined, and that the effect of the decision impacts that particular "public" in a uniform way. That is why our suggestions to paragraph (a) (4) are critically important to this discussion.

Paragraph (a) (4) of Section 18707.4 currently defines the "public" for the purposes of this section to be a "significant segment" of the persons the member was appointed to represent. We think this language is conceptually right on target. But as we know, that section is subject to cross-referencing to Sections 18707.1 and 18707.7, which define "significant segment" for different types of boards and commissions. Neither section, however, fits L.A. Care's unique situation.

Section 18707.1 defines a significant segment as 2,000 or 25 percent of all of the business entities in the jurisdiction the official represents, *as long as the effect of the decision is on*

persons composed of more than a single industry, trade or profession. Clearly, however, decisions made by L.A. Care's Board of Governors affect only a narrow segment of the health care industry—the clinics, hospitals, physicians, federally qualified health centers and other providers that treat Medi-Cal patients through L.A. Care. Thus, it appears that the public generally exception could not be applied at all to L.A. Care's board if the definition of "significant segment" in Section 18707.1 were applied.

Section 18707.7 defines "significant segment" for the purpose of boards dealing with specific industries, trades or professions. Under this rule, a "significant segment" would be affected if the relevant industry, trade or profession were a "predominant" industry, trade or profession in the board member's jurisdiction. A "predominant" industry, trade or profession is defined as one that constitutes 50 percent or more of the business entities within the board's jurisdiction. L.A. Care's "jurisdiction"—if we can use that term loosely for the time being—includes more than one industry, trade or profession, and no one may be predominant. So while this definition of "significant segment" may permit pharmacist members of the California Board of Pharmacy to vote on regulations and other policies that affect all pharmacists in the same manner, it is very difficult to apply to L.A. Care, which has, under contracts or subcontracts, five health plans, 12 community clinics, 12 federally qualified health centers, 111 hospitals and 12,759 physicians.

Even if we could resolve the question of which stakeholder group was predominant, the board members representing the entities that are not "predominant" would continue to have conflict-of-interest barriers, and thus the balance of power on the board would be distorted. This is not what we believe the Legislature intended.

Thus, we strongly agree with FPPC staff's suggestion that "significant segment" be defined for the purposes of Section 18707.4 within that section. We believe that the most important aspect of that definition, however, is that the universe of persons or entities from which the "significant segment" is measured be an appropriate universe. In the case of the California Board of Pharmacy, that universe is California pharmacists—and all California pharmacists are subject to the Board's actions. In the case of L.A. Care's Board of Governors, however, the universe of persons subject to the Board's action includes only the physicians, hospitals, clinics, federally qualified health centers, health plans and consumers who participate in L.A. Care Health Plan. The contract amendments and policies that L.A. Care's Board implements do not affect providers who do not contract or subcontract with L.A. Care. Including others in this universe does not further the purpose of the "public generally" exception.

Thus, we would like to see language clarifying that the decision must affect a significant segment of the persons the member was appointed to represent *whose financial interest could foreseeably be affected by decisions of the board or commission.*

The physicians, hospitals, clinics and other stakeholders that do not choose to participate in L.A. Care's programs—usually because they do not treat the Medi-Cal population—cannot be affected by L.A. Care's decisions. Thus, these entities or persons are not within L.A. Care's "jurisdiction" and should not be included in the calculation used to determine whether a decision of the L.A. Care Board of Governors affects a "significant segment" of the relevant group. As long as a decision will affect a significant segment of the relevant group in the same manner, the representative of that group should be permitted to participate in the decision.

Retaining the current regulation definition of the universe to be considered in calculating "significant segment" would upset the balance among the various stakeholder groups that the Legislature designated for L.A. Care's Board. In some cases, L.A. Care contracts directly or

indirectly with 85 percent of the Los Angeles County providers in a particular stakeholder category. In other cases, the percentage is much smaller—only 7.5 percent in one case. If the regulation requires that every provider in Los Angeles County in a given stakeholder category be considered for the purpose of determining what constitutes a significant segment of the “public generally,” some Board members would be permitted to participate in decisions that affect all categories of providers in substantially the same manner and some would not. Thus, the representatives of some stakeholder groups would have more power on the Board than others. This is not a desirable outcome, and not one that is consistent with the purpose for which Regulation 18707.4 was enacted.

Thus, it is critical that the proper universe be used when determining when a decision would affect a significant segment of the public. We believe that the universe should be the persons and entities that L.A. Care can affect—namely, those that contract directly or indirectly with L.A. Care. If the appropriate universe is defined, then the percentage figure to be applied could be set at 25 percent, consistent with the “business entities” provision in Section 18707.1.

These requested changes would aid L.A. Care in making appropriate determinations about conflicts of interest, and allow our board members to participate in decisions that have general effect on the health plan’s providers. We hope that you will consider our suggestions. As always, if you have any questions, please feel free to call me at (916) 447-7933.

Regards,



MAUREEN O'HAREN

cc: Bill Williams, Fair Political Practices Commission
Augustavia Haydel, General Counsel, L.A. Care Health Plan
Steven L. Dorsey, Richards, Watson & Gershon
Consuelo Hernandez, L.A. Care Health Plan

L.A. Care Draft Language

October 10, 2001

Title 2, Division 6, California Code of Regulations

18707.4 Public Generally: Appointed Members of Boards and Commissions

(a) For the purposes of Government Code section 87103, the "public generally" exception applies to appointed members of boards and commissions who are appointed to represent a specific economic interest, as specified in section 87103 (a) through (d), if all of the following apply:

- (1) The statute, ordinance, or other provision of law which creates or authorizes the creation of the board or commission contains a finding and declaration *or other statutory provision* that the persons appointed to the board or commission are appointed to represent ~~and further the interests of~~ the specific economic interest.
- (2) ~~The member is required to have the economic interest the member represents.~~
- (3) The board's or commission's decision does not have a material financial effect on any other economic interest held by the member, other than the economic interest the member was appointed to represent.
- (4) The decision of the board or commission will financially affect the member's economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect ~~a significant segment~~ *at least 10 percent* of the persons the member was appointed to represent *whose financial interest could foreseeably be affected by decisions of the board or commission.*

(b) In the absence of an express finding and declaration of the type described in Title 2, California Code of Regulations, section 18707.4 ~~(b)~~ (a) (1), the "public generally" exception only applies if such a finding and declaration is implicit, taking into account the language of the statute, ordinance, or other provision of law creating or authorizing the creation of the board or commission, the nature and purposes of the program, any applicable legislative history, and any other relevant circumstance.